

Mr. Billy Cypress, Chairman  
Miccosukee Tribe of Indians of Florida  
P.O. Box 440021  
Tamiami Station  
Miami, Florida 33144

Dear Mr. Cypress:

The Environmental Protection Agency (EPA) has reviewed the Miccosukee Environmental Protection Code, Subtitle B: Water Quality Standards for Surface Waters of Miccosukee Tribe of Indians of Florida, adopted on December 19, 1997, and revised on March 4, 1998, for the Tribe's "Federal Indian Reservation," as defined in the May 27, 1994, application to conduct a federally approved Water Quality Standards Program. In addition to the Tribe's Water Quality Standards referenced above, the submittal included the January 14, 1998, and March 4, 1998, certifications by the Tribe's General Counsel, Mr. Dexter Lehtinen, that the Miccosukee Tribe's Water Quality Standards (MWQS) were duly adopted pursuant to Tribal law.

The adopted standards are applicable to the waters within the exterior boundaries of the Tribe's Federal Reservation, which is defined as the I-75 Reservation, Tamiami Trail Reservation, Krome Avenue Reservation, and Dade Corners Reservation. The location of each area is shown on the maps in Appendix 1 of the MWQS. The areal extent of the waters protected by the water quality standards is co-extensive with the authorization granted the Tribe on December 20, 1994.<sup>1</sup>

In accordance with the procedural requirements of 40 C.F.R. § 131.20, the Tribe sought public comment through three public hearings and comment periods. Comments were received from the State of Florida, Seminole Tribe of Florida, members of the agricultural and environmental communities, and several citizens of South Florida. The comments and the Tribal response were included as part of the Water Quality Standards submittal.

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<sup>1</sup> The Tribe received authorization to conduct a federally approved water quality standards program for its "Federal Indian Reservation" defined as the I-75 Reservation, the Southern Reservation (three parcels of land north of Permit Area), and the Krome Reservation (two parcels of land housing the Bingo facility and the Smoke Shop). In the MWQS, the area defined as the Southern Reservation in the authorization is specified as the Tamiami Trail Reservation. Also, the Krome Reservation was further delineated in the MWQS as both the Krome Avenue Reservation (Bingo Hall) and the Dade Corners Reservation (Smoke Shop). See Map F in Appendix 1.

The Tribe's submittal was compared to the requirements for water quality standards submissions at 40 C.F.R. §§ 131.10, through 131.13, "Establishment of Water Quality Standards." These requirements and the results of our review are discussed in the following paragraphs.

#### **40 C.F.R. § 131.10 Designation of Uses**

The classification system adopted for Tribal waters is composed of three classes, one of which has two subclasses. They are I, II, III-A and III-B. The designated uses in these classes include the "fishable/swimmable" goal of Section 101(a)(2) and are consistent with Section 303(c)(2) of the Clean Water Act (CWA). All Reservation waters are designated as Class III-A or III-B and meet the requirements at 40 C.F.R. § 131.10. (No waters have been designated as Class I for potable waters or as Class II for propagation or harvesting of shellfish or other invertebrates.)

#### **40 C.F.R. § 131.11 Criteria**

In addition to narrative criteria, the Tribe adopted numeric criteria based on EPA's published Section 304(a) criteria for Section 307(a) toxic pollutants and other pollutants as appropriate for Tribal waters. The adopted criteria comply with the federal requirements at 40 C.F.R. § 131.11. No criteria were adopted for waters designated as Class II. EPA understands that the Class II classification is reserved for future use. Prior to the assignment of any waters to Class II, criteria to protect the use must be adopted.

Also, the Tribe adopted a narrative phosphorus criterion for Class I and Class III-B waters and a numeric 10 ppb phosphorus criterion for Class III-A water bodies, which are more sensitive. The narrative phosphorus standard is consistent with EPA's guidance on the adoption of narrative criteria. With regard to numeric criteria for nutrients such as phosphorus, EPA recognizes the variability in inherent nutrient levels and nutrient responses across the waters of the nation. EPA is in the process of developing water body-type criteria guidance for States and Tribes to use as guidance in adopting such water quality criteria (see 63 *Federal Register* 34648, 1998). However, to date, EPA has not published numeric water quality criteria for phosphorus which could serve as the basis for EPA's review of the scientific defensibility of the Tribe's standards, consistent with the requirements at 40 C.F.R. § 131.11. While the Tribe provided a number of papers from scientific journals and depositions from scientific experts in support of its 10 ppb phosphorus criterion, no documentation was provided delineating how the Tribe derived a numeric criterion protective of the Class III-A designated use. Therefore, EPA scientists reviewed the information provided by the Tribe as well as other information currently available to EPA in the scientific literature to determine whether the adopted criterion meets the requirements of 40 C.F.R. § 131.11. Based on this review, EPA has determined 10 ppb phosphorus is a scientifically defensible value which is not overly protective and will protect the designated use adopted by the Miccosukee Tribe for its Tribal waters. However, recognizing that additional data and information is being collected on the Everglades system by a variety of interested parties, if

additional evidence is presented that demonstrates that 10 ppb is not protective of the Class III-A designated use, then the Tribe should revise the 10 ppb standard accordingly. EPA's determination is enclosed.

#### **40 C.F.R. § 131.12 Antidegradation Policy**

The antidegradation policy in Section 2 of the MWQS is consistent with the requirements of EPA's antidegradation policy at 40 C.F.R. § 131.12. An additional level of protection, Outstanding Miccosukee Waters, was provided to preserve water bodies in as pristine a condition as possible while at the same time allowing for activities of man. In addition to the adoption of an antidegradation policy, the Tribe is required to identify implementation methods to address both point and nonpoint sources. Section 2C outlines a plan for implementing the Tribal standards in general, but it does not contain procedures that implement the Tribal antidegradation policy. In the interim, before more detailed implementation procedures are developed by the Tribe, the Tribe has identified the Region 4 implementation procedures as the procedures that will be used to implement this portion of the water quality standards. EPA understands that the development of the initial water quality standards is a huge task and Tribal resources are limited. However, before the first Triennial Review, the Tribe should develop full implementation procedures for its antidegradation policy to address point and nonpoint sources. These procedures should address designation criteria for Tier 2 waters, Outstanding Miccosukee Waters, and Outstanding Natural Resources Waters; types of activities regulated, determination of applicability, alternative analysis, and socio-economic evaluation; and public review for each tier of the Tribal antidegradation policy. EPA requests that the Tribe provide draft procedures for EPA review to ensure the final procedures do not result in the Tribe's antidegradation policy being inconsistent with 40 C.F.R. §131.12.

#### **40 C.F.R. § 131.13 General policies**

General information regarding the implementation of the MWQS is provided in the following sections of the Code:

- (1) Section 1 - policies on flow rates, applicability, and Tribal staff responsibility,
- (2) Section 6 - sampling and analysis procedures,
- (3) Section 7 - variances and mixing zones policies, and
- (4) Section 8 - definitions applicable to the MWQS.

The provisions of these sections are consistent with the Section 101(a)(2) goals of the CWA and EPA's policy and guidance.

As part of the in-depth review of the 10 ppb total phosphorus criterion for Class III-A waters, EPA asked the Tribe to explain the implementation procedures for the criterion. The Tribe provided its “Methodology for Determination of Compliance with the 10 Parts Per Billion Numeric Criterion for Total Phosphorous” which described the procedures used to determine compliance with the criterion in Class III-A waters of the Alligator Alley Reservation (I-75 Reservation). The procedures identified sampling locations, flow requirements, method and frequency for sample collection, calculation method, and compliance criteria. When the criterion is implemented using this methodology, the phosphorus value should be protective of the designated use. EPA recognizes that the Tribe is in the initial phase of implementing its standards, and may revise them based on experience. If these procedures are revised, please provide them to EPA for its review.

The Tribe’s variance policy provides EPA with the authority to grant a water quality standard variance with the approval of the Tribe. However, EPA’s procedure is to review a Tribe-adopted variance from its water quality standards, rather than to grant variances ourselves. A variance application should be sent to the Tribe directly. If during the National Pollutant Discharge Elimination System permitting process a variance application is received as part of the permit application, EPA will submit the variance request to the Tribe for its consideration. During the first Triennial Review, the Tribe should revise the standards to allow only the Tribe to grant a variance which is subject to EPA approval.

In Section 8, the definition of attainable use appears to differ from EPA’s definition which states that “*At a minimum, uses are deemed attainable if they can be achieved by the imposition of effluent limits required under sections 301(b) and 306 of the Act and cost effective and reasonable best management practices for nonpoint source control.*” (40 C.F.R. § 131.10(d)). EPA’s definition relates to the capability of controlling point and nonpoint source discharges to achieve the use, while the Tribal definition deals with the level of water quality needed to support characteristics of the use or attain the criteria. While the Tribal definition may not result in adopted water quality standards that are inconsistent with the CWA, this definition is circular in logic and adds no meaningful criteria for measurement of attainment. During the first Triennial Review, the Tribe should either revise the definition to be consistent with 40 C.F.R. § 131.10(d) or delete it.

As part of EPA’s review, the Agency prepared a biological evaluation for the proposed MWQS pursuant to the requirements of the Endangered Species Act. The U.S. Fish and Wildlife Service’s (FWS) Vero Beach, Florida Office concurred with our evaluation that EPA’s approval of the Tribal water quality standards is “not likely to adversely affect” federally endangered or threatened species or critical habitat occurring on the Miccosukee Reservation. The FWS’s September 17, 1997, letter is enclosed. The final standards did not differ materially from the proposed ones.

The State of Florida requested that EPA evaluate the consistency of the Tribe standards with Florida’s Coastal Management Program (CMP). EPA reviewed the Tribe’s submittal and

the CMP, and informed the State that the Miccosukee standards would be “consistent to the maximum extent practicable with the enforceable policies of approved State management programs.” On November 30, 1998, the State concluded that “EPA approval of the Tribe’s water quality standards is ... consistent with the Florida Coastal Management Program.”

## **Conclusion**

The adoption of water quality standards is a major milestone in the Miccosukee Tribe's continuing effort to protect the quality of Tribal waters and the South Florida environment. The rules and supporting documentation submitted are consistent with the Federal water quality standards regulation 40 C.F.R. Part 131. In accordance with Section 303 (c) of the CWA and 40 C.F.R. Part 131, EPA hereby approves the Miccosukee Tribe's Water Quality Standards for all waters within the exterior boundaries of the Miccosukee Tribe's “Federal Reservation” as defined in the Tribe's May 27, 1994, request for authorization.

We would like to commend the Miccosukee Tribe for being the second Tribe in Region 4 to adopt a federally approved water quality standards program to safeguard the quality of Reservation waters. You and your staff have demonstrated a sincere concern for the protection of the South Florida environment.

Mr. Bill Melville, Chief of the Geographic Planning and Water Quality Standards Section, and his staff will be happy to assist you and your staff in the further development and implementation of your water quality standards program. As we stated in previous comments, the Tribe should develop full implementation procedures for its antidegradation policy before the first Triennial Review. In the interim, Region 4, as the permitting authority, will use its regional implementation procedures should the need for antidegradation implementation arise in the permitting of a new or increased point source discharge. If additional Triennial Review activities or tasks are identified for Region 4 States and Tribes, we will advise you.

EPA will monitor implementation of the newly adopted standards to ensure consistency with CWA requirements. Should you have any questions or need further assistance, please call Mr. Melville at (404) 562-9266 or Ms. Eve Zimmerman at (404) 562-9259.

Sincerely,

/s/John H. Hankinson, Jr  
Regional Administrator

Enclosures

cc: Truman E. Duncan, Director  
Miccosukee Water Resource Management  
David B. Struhs, Secretary  
Florida Department of Environmental Protection  
Kathy Gorospe, Director  
EPA, American Indian Environmental Office  
Fred Leutner, EPA, Office of Science and Technology